Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Canadian Broadcasting Corporation,

applicant,

and

Syndicat des communications de Radio-Canada (FNC-CSN); Syndicat des technicien(ne)s et artisan(e)s du réseau français de Radio-Canada (STARF); Canadian Union of Public Employees; Association des réalisateurs,

bargaining agents,

and

Association of Professionals and Supervisors of the Canadian Broadcasting Corporation; Canadian Media Guild,

interested parties.

Board File: 29449-C
Neutral Citation: 2012 CIRB **664**
November 22, 2012

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Daniel Charbonneau and Patrick J. Heinke, Members.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

Canada

Section 16.1 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the parties' submissions, the Board is satisfied that the documents on file are sufficient to deal with the preliminary issues raised in this matter without holding an oral hearing.

Parties' Representatives of Record

Messrs. Alexandre W. Buswell and Frédéric Massé, for the Canadian Broadcasting Corporation;
Mr. Guy Martin, for the Syndicat des communications de Radio-Canada (FNC-CSN);
Ms. Louise-Hélène Guimond, for the Syndicat des technicien(ne)s et artisan(e)s du réseau français de Radio-Canada (STARF);
Mr. Michael Cohen, for the Canadian Union of Public Employees;
Mr. Jean-Pierre Belhumeur, for the Association des réalisateurs;
Mr. Mario Poudrier, for the Association of Professionals and Supervisors of the Canadian Broadcasting Corporation;
Ms. Carmel Smyth, for the Canadian Media Guild.

I–Nature of Motions and Background

[1] The Board has before it two motions filed at the same time by the Association des réalisateurs (AR). Both are in connection with the application for review filed by the Canadian Broadcasting Corporation (CBC) on May 31, 2012, pursuant to section 18.1 of the *Code*, in which the CBC sought a declaration by the Board that the existing bargaining unit structure (four units) is no longer appropriate for collective bargaining. The AR is the bargaining agent representing the CBC French network's producers.

[2] It should be noted that hearing dates have been set by the Board, and the employer will begin presenting its case on November 26, 2012.

A–Motion to Be Removed as a Party

[3] In its first motion, the AR is seeking to be removed as a party on the basis that the CBC's application for review does not concern the bargaining unit it represents.

[4] Essentially, the AR submits that the Board already ruled, both in *Canadian Broadcasting Corporation* (1994), 96 di 1 (CLRB no. 1091) (RD 1091), dated November 15, 1994, and in *Société Radio-Canada*, 2005 CIRB 307 (RD 307) dated January 24, 2005, that the CBC French network's producers should form a separate unit because they perform supervisory duties and cannot be included in the same unit as the employees they supervise. The AR refers the Board in particular to RD 307, which reads in part as follows:

> [60] There is at least one other reason against merging the bargaining units, which has to do with the producers at the French network. These employees still perform tasks that are quite separate from those performed by members of the other bargaining units, and exercise a supervisory role in producing programs. ...

[5] The AR submits that none of the allegations made by the CBC in its review application refers to changes of any kind in the supervisory role of the producers at the CBC French network.

[6] The AR accordingly asks the Board to be removed as a party and to declare that there is no need to call into question the appropriateness to bargain of the unit it represents.

[7] The Syndicat des technicien(ne)s et artisan(e)s du réseau français de Radio-Canada (STARF) and the Canadian Union of Public Employees (CUPE) indicated that they would abide by the Board's decision on this motion. The Syndicat des communications de Radio-Canada (FNC-CSN) informed the Board verbally that it would not be making any submissions.

[8] The CBC submits that the AR's motion to be removed as a party is not warranted at this stage, since the Board must first rule on whether or not there is a need to review the existing bargaining unit structure at the CBC French network, in accordance with section 18.1 of the *Code*. The CBC adds that, if the Board decides that the structure as a whole is no longer appropriate for bargaining, it will direct the parties to negotiate an agreement respecting a new structure themselves. The CBC considers that it is at that second stage that the AR can claim that the new structure must include a separate unit for all (or some) of the production duties.

[9] In the opinion of the CBC, the AR is confusing the two stages of the process provided for in section 18.1 of the *Code* and is essentially asking the Board through its motion to immediately move to the second stage when the parties have not yet begun the hearings in the first. The CBC

considers that the argument put forth by the AR is irrelevant and does not justify its being removed as a party.

[10] In reply, the AR again refers to RD 1091 and RD 307, in which it was held that even if reasons such as technological changes, growth of competition or budget cuts warranted a ruling by the Board that some units were no longer appropriate for bargaining, the unit represented by the AR would continue to be appropriate for bargaining given that the producers perform supervisory duties and cannot be included in the same unit as the employees they supervise. The AR submits that the Board heard extensive and significant evidence in this regard that dealt specifically with the supervisory role of producers and that the CBC cannot today contend that this is irrelevant at the current stage of its application.

[11] The AR accordingly submits that, if the CBC now wishes to argue that the producers' unit is no longer appropriate for bargaining, it has to indicate that changes have rendered the unit henceforth inappropriate for bargaining.

B–*Res Judicata* Motion to Dismiss

[12] In its second motion, the AR seeks dismissal by the Board of the CBC's review application on the basis of *res judicata*.

[13] Essentially, the AR submits first that the CBC's application involves the same parties, the same purpose and the same matter as already decided by the Board, and second that the application is based on the same grounds as the review application ruled on in RD 307. The AR explains that, in the context of the previous review application, the employer filed an amended review application on March 16, 2001, and presented arguments on December 5, 2003, in which it raised the same points, that is, technological changes, competition and budget cuts, career progression, professional training and cross-unit work and hybrid jobs.

[14] The AR submits that the CBC withdrew both its reconsideration application and an application for judicial review in the Federal Court of Appeal in relation to RD 307.

[15] The AR considers that the application to review the structure of the bargaining units filed by the CBC is nothing more that a new challenge of RD 307, issued by the Board in 2005, and a questioning of the findings of fact and law in that decision.

[16] The AR refers to the principles respecting *res judicata* raised by the Board in *Nickerson*, 2010 CCRI 514; *Air Canada*, 2004 CIRB 305 and *Colispro Inc.*, 2011 CIRB 588, and similar principles raised in *Transport Morneau Inc.*, 2001 CIRB 113. The AR submits that the Board should apply the same principles in the instant matter since the CBC's application is based on the same grounds and relies on the same facts or facts of a similar nature.

[17] The AR submits that there is nothing in the allegations made in the CBC's application to suggest that the CBC made even a remotely serious effort to explain to the unions the real problems it wanted resolved or to seek a solution to its alleged problems through negotiation. The AR concludes that, since the Board did not accept the CBC's claims in 2005, which were based on the same points as in the current application, the Board must dismiss the said application because of *res judicata* and also because it is clearly a disguised appeal of RD 307.

[18] STARF and CUPE are in agreement with the AR's motion seeking dismissal of the CBC's review application on the basis of *res judicata*. FNC-CSN indicated that it would not be making any submissions in this regard.

[19] The CBC submits that the *res judicata* motion to dismiss is without merit. It states that, like any application under section 18.1 of the *Code*, an application for review of the structure of bargaining units is basically an application for reconsideration of the decision that established the union structure being challenged. The CBC maintains that a process under section 18.1 of the *Code* is permissible from time to time when a change in the environment warrants it, to prevent bargaining units from becoming unduly static and not only hindering the development of Canadian industry, but also impeding true interest-based bargaining.

[20] The CBC moreover considers it normal and logical that, overall, the employer's application raises arguments that are similar to those raised in the application considered in RD 307, but adds that the application in the instant matter was made in a different context from the one in the

decision issued in January 2005. It submits that the facts behind the two applications are consequently not the same and so the rule of *res judicata* is not applicable in the instant matter.

[21] The CBC adds that, like the AR's motion to be removed as a party, the *res judicata* motion seems to reveal a lack of understanding of the process established by section 18.1 of the *Code*, since the purpose of that section is to enable the Board to review the appropriateness of an existing union structure in the light of new circumstances. The CBC submits that the current union structure for the CBC's French network has existed since 1995 and, obviously, the review of its appropriateness must take into account changes that have taken place within the corporation since that time.

[22] The CBC concludes that there is nothing in the AR's motion to dismiss that would cause the Board to decline to exercise its jurisdiction in the instant matter.

[23] In its reply, the AR submits that the CBC is mistaken when it claims that the rule of *res judicata* is obviously incompatible with section 18.1 of the *Code*. The AR refers to several Board decisions in which this principle was recognized, including *Colispro* and *Transport Morneau Inc.*, *supra*. Acknowledging that some of those decisions pertained to applications under section 18 rather than section 18.1 of the *Code*, the AR nonetheless maintains that there is no difference in the nature of section 18.1 and that of section 18 of the *Code*.

[24] The AR believes that, since the bargaining unit structure was already raised by the CBC in an application for review in the recent past and the Board already ruled on the matter in RD 307, the principles set forth by the Board in regard to reapplications under section 18 of the *Code* should be applied to the CBC's new application. The AR adds that, if the CBC wanted to avoid the bar of *res judicata* in relation to its application to restructure the bargaining units, it should have at the very least put forward some new facts that had arisen since 2005 to satisfy the Board that the existing units were no longer appropriate for bargaining, contrary to what had been decided in RD 307. The AR maintains that the burden was on the CBC to show how such facts were new and how they might lead the Board to find differently than it did on an application based on the same grounds or grounds of a similar nature. In the opinion of the AR, the CBC failed to raise any real problems attributable to a new factual situation. It submits that the Board

should consequently apply its policy and find that there is no point in re-arguing the same issues already ruled on and dismiss the CBC's application on the basis of *res judicata*.

[25] The AR submits that there is no doubt that what the CBC is asking the Board is not whether facts that have arisen since 2005 have made the units inappropriate for bargaining but, rather, whether RD 307 was sound, given the facts that had arisen since 1995 and that are still applicable today. The AR is of the view that the CBC's application is in a way an application to have the RD 307 revoked.

II–Analysis and Decision

[26] The two motions filed by the AR are actually preliminary objections in regard to the application for review of the bargaining unit structure filed by the CBC pursuant to section 18.1(1) of the *Code*.

[27] The CBC is seeking the creation of a single unit, to which the bargaining agents are vigorously opposed. Both of the AR's motions rely on RD 307, issued on January 24, 2005, after an application for a review of the bargaining unit structure was filed by the CBC on December 15, 2000, and amended in March 2001. In RD 307, a majority of the Board's panel concluded that it was not appropriate to review the existing bargaining units at the CBC French network.

[28] After considering the submissions made by the parties regarding the AR's two motions challenging the CBC's original application in the instant matter, the Board finds that it cannot summarily dismiss the CBC's application for review or remove the AR as a party.

[29] First, in its application for review, the CBC alleges that major changes have taken place in the telecommunications industry in recent years. The Board deems it necessary to take a closer look at those changes to determine whether they have had an impact on the current structure of the bargaining units. It is worth noting that the current structure of the bargaining units was established in 1995 and that RD 307 related to an application for review filed by the CBC pursuant to section 18.1(1) of the *Code* in December 2000 and amended in 2001, that is, more than 10 years prior to the filing of the application in the instant matter.

[30] Second, the *Code* has since January 1, 1999, provided an express process for reviewing bargaining unit structures which may have been rendered inappropriate for collective bargaining because of circumstances that the Board has a duty to consider. In its review application, the CBC raises some important points that argue for a proper hearing by the Board to determine whether the evidence leads it to a finding that the existing units are no longer appropriate for collective bargaining, within the meaning of section 18.1(1) of the *Code*.

[31] The Board notes that, prior to the amendments to the *Code* enacted on January 1, 1999, the former Board restructured bargaining units and conducted what were called "global reviews" under the Board's general reconsideration power under section 18 of the *Code*. This provision of the *Code*, which remains unchanged, enables the Board to "review, rescind, amend, alter or vary any order or decision made by it."

[32] Section 18 of the *Code* has several facets. On the one hand, it provides the Board with the general power to rescind or amend, alter or vary a certification order. That power includes, for example, the power to review the scope of a bargaining unit. On the other hand, section 18 provides the Board with the power to reconsider any of its previous decisions under certain circumstances, which are set out in section 44 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*). The Board explained these two facets of section 18 in *Air Canada*, *supra*:

> [17] The general powers conferred on the Board pursuant to section 18 of the *Code* are essentially exercised within two different contexts. The first being a general review power by the Board to amend, rescind, alter or clarify and confirm the intended scope of a previously issued order, at the request of a party or of its own motion. The second being when a party seeks a **reconsideration** of a Board decision or order. In this context, specific time limits and requirements apply pursuant to sections 44 and 45 of the *Canada Industrial Relations Board Regulations, 2001*.

[33] Section 18.1 was added to the *Code* for the express purpose of giving the Board the power to review more than the scope of a bargaining unit. Under that section, the Board may review the structure of bargaining units for employers with more than one bargaining unit, on application by the employer or a bargaining agent concerned, where the Board is satisfied that the existing structure is no longer appropriate for collective bargaining.

[34] In the same vein, the panel of the Board in this matter does not share the view of the AR and the other trade unions regarding the application of the rule of *res judicata*. If it did, it would be

unable to entertain any applications for review of bargaining unit structure under section 18.1(1) of the *Code* once it had established a bargaining structure, yet the express purpose of that provision of the *Code* is to give the Board the power to consider such applications.

[35] In *Bayside Port Employers Association Inc.*, 2004 CIRB 293, the Board indicated that the rule of *res judicata* should be applied with circumspection. In that decision, the Board denied the preliminary objection of *res judicata* in relation to the certification order it had issued seven years earlier on the basis that the legislation that governs the Board gives it the power to review its own decisions. It stated the following in this regard:

> [22] The Board has, however, as have other labour tribunals, applied this rule with circumspection because of the evolving context of labour relations. In the case of the Canada Industrial Relations Board, section 18 of the *Code* provides a broad and unusual exception to the rule, as applied by the courts, in that the Board has the power to review its own decisions:
>
> "18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."
>
> [23] Consequently, **the Board may at any time, upon application by the parties, review the bargaining certificate.** The review of a bargaining certificate works both ways. The union may apply to enlarge the certificate just as the employer may apply to modify the composition of the bargaining unit as a result, for example, of corporate changes.
>
> (emphasis added)

[36] In that decision, the Board had before it an application for review of a geographic certification under section 18 of the *Code*. The Board believes that the factors taken into consideration by the Board in regard to *res judicata* in *Bayside Port Employers Association Inc.*, *supra*, are essentially the same in the context of a review of the bargaining unit structures applied for under section 18.1 of the *Code*. Consequently, the Board finds that the rule of *res judicata* is not applicable in the instant matter.

[37] In fact, the circumstances of the instant matter may be distinguished from those in the decisions relied upon by the AR in its motion. None of those decisions involved an application for a review of the scope of a bargaining unit pursuant to section 18 or a restructuring application pursuant to section 18.1.

[38] In *Colispro Inc.*, 2011 CIRB 613, the Board considered the issue of *res judicata* in connection with an application for certification filed by the Canadian Union of Postal Workers pursuant to section 24 of the *Code*. Colispro contested the fact that it was the employer of the employees covered by the application and also raised a preliminary objection claiming *res judicata* on the basis that the Board had decided the issue in connection with an earlier application for certification filed by the Teamsters.

[39] The Board acknowledged that, by virtue of its power under section 18 of the *Code*, it could review a certification order on the basis of new facts and changes in the specific labour relations environment. However, the Board emphasized that it could not rescind or amend, alter or vary a certification order it had made on the application of a different union that had not been a party to the previous certification application and was later unhappy with the decision issued.

[40] In light of the specific facts in *Colispro Inc.*, *supra*, the Board sustained the employer's preliminary objection. However, it did so based not so much on *res judicata* as on the lack of evidence of changes in connection with the earlier certification order and the employer's status. The Board noted that "the rule of *res judicata* should be applied with circumspection." It was in fact on these elements of the decision that the Board relied to dismiss the application for reconsideration in *Colispro Inc.*, *supra*.

[41] Both *Air Canada* and *Transport Morneau Inc.*, *supra*, involved a reconsideration application under section 18 of the *Code* to which section 44 of the *Regulations* applied. They did not involve an application for review of a bargaining unit pursuant to section 18 of the *Code* or an application for review of the structure of units pursuant to section 18.1.

[42] The application in *Air Canada*, *supra*, was dismissed, since it was an application for reconsideration of a reconsideration decision. The Board indicated that it does not entertain second or multiple reconsideration applications.

[43] The application in *Transport Morneau Inc.*, *supra*, related to several Board decisions in which 35 certification applications had been dismissed on the basis that the union had failed to provide evidence of sufficient representation. The union subsequently filed an application for reconsideration of the decisions, citing the existence of new facts. The Board dismissed the

reconsideration application on the basis that the new facts in question could have been brought before the Board at the time it had dealt with the original files. Additionally, the application was a roundabout attempt on the part of the union to make a new application for certification prior to expiry of the time bar of six months following the dismissal of its earlier application under the Board's 1992 *Regulations*.

[44] In the instant matter, the application for a review of the structure of the bargaining units was filed by the employer, a party to the original application for certification and the original application for a review of the unit structure. Additionally, the application in the instant matter was filed more than 10 years after the application to restructure the bargaining units and, in the Board's opinion, sets out allegations of technological changes and developments that need to be examined in depth before deciding whether or not the units are still appropriate for collective bargaining.

[45] In view of the foregoing, the Board does not believe that the AR's preliminary motion claiming *res judicata* should be granted given the circumstances in the instant matter.

[46] In addition, the Board considers that the AR's motion to be removed as a party at this stage is invalid given that, as noted by the CBC in its submissions, the Board must begin by ruling solely on whether or not the existing units remain appropriate for collective bargaining, based on the evidence that will be adduced. The Board explained the rationale behind this requirement in *Expertech Network Installations Inc.*, 2002 CIRB 182:

> [109] Section 18.1(1) is the mechanism under which either an employer or a bargaining agent can apply independently, in the absence of any of the circumstances necessary to file the application within sections 35 or 45 of the *Code*, to have the Board review bargaining unit structures. As can be seen in the earlier quotation from the Sims Report, because of the "substantial disruption and expense" that bargaining unit reviews cause, it recommended that Parliament include a test for applicants to meet in order for the Board to undertake such a review absent a section 35 declaration or an application pursuant to section 45. The Sims Report suggested that applicants should have to "satisfy the Board that there are serious problems with the current bargaining structures," "[o]therwise there is no justification for interfering with the employees' choice of bargaining agent." This is reflected in the *Code* by Parliament's addition of the words "if it is satisfied that the bargaining units are no longer appropriate for collective bargaining" in section 18.1(1) of the *Code*, a wording that does not exist in either of sections 35(2), 45 or 18.1(2).

[47] In the event that the Board rules that it is not appropriate to review the existing structure of the bargaining units, the employer's application will be dismissed and the unions concerned,

including the AR, will not be required to present arguments on the makeup and structure of the units.

[48] Conversely, if the Board rules pursuant to section 18.1(1) of the *Code* that the units are no longer appropriate for collective bargaining, it will at that point determine the bargaining unit structure. In such a case, given the circumstances in the instant matter, the Board has agreed to allow the parties to come to an agreement about the appropriate bargaining units.

[49] In short, the Board will decide this matter once all of the parties have had the opportunity to make representations.

[50] For all the foregoing reasons, the Board denies the two motions filed by the AR.

[51] This is a unanimous decision of the Board.

Translation

Louise Fecteau
Vice-Chairperson

Daniel Charbonneau
Member

Patrick J. Heinke
Member